I therefore give judgment for the plaintiff:—

1. (i) the sum of $18,000.00 for pain and suffering and loss of amenities;
   (ii) the sum of $10,000.00 as probable loss of future earnings;

   General damages: $28,000.00.

2. The sum of $1,300, as agreed for special damages.
3. Interest at the accepted rates for 1(i) and 2 above.
4. Costs.

Order accordingly.

Solicitors: *Triptipal Singh & Co.; Peh Swee Chin & Co.*

ABDUL HAMID v. OOI TEIK EAN & ANOR.

[O.C.J. (Syed Agil Barakbah J.) June 3, 1978]
[Alor Star — Civil Suit No. 303 of 1975]

Damages — Compound fracture of the right leg, ¼" shortening and abrasion on the face — Liability admitted — Quantum in dispute — Interest on general damages.

The plaintiff, a 42 year old padi planter and owner of a piece of paid land, was injured as a result of an accident involving the scooter on which he was a pillion rider and a motor lorry driven by the first defendant. The second defendant was the owner of the said lorry. The plaintiff sustained compound fracture of the right leg, ¼ inch shortening and abrasion on the face. X-ray revealed that there was comminuted fracture in the mid-shaft of the right tibia and fibula.

Held: (1) the plaintiff was awarded a total sum of $18,000 as general damages: $10,000 for pain and suffering, including ¼ inch shortening of the right leg, $3,000 for loss of amenities and $5,000 for loss of future earnings;

(2) no interest on general damages for pain and suffering was awarded. However, interest on special damages at 3% was awarded from the date of the accident until the date of trial.

Cases referred to:-

(1) *Marcroft* v. *Scruttons* [1954] 1 Lloyd's L.R. 395.
(2) *McAuley* v. *London Transport Executive* [1957] 2 Lloyd's L.R. 500, 505.
(3) *Jefford & Anor.* v. *Gee* [1970] 1 All E.R. 1202.
(4) *Cookson* v. *Knowles* [1977] 2 All E.R. 820.

CIVIL SUIT.

Oo Gin Sun for the plaintiff.

N.T. Vello for the defendants.

Cur. Adv. Vult.

Syed Agil Barakbah J.: The plaintiff's claim against the defendants is for damages due to injuries received as a result of a motor accident which took place on the 21st day of December, 1976 at about 1.30 p.m. along the 19 milestone Alor Star/Sg. Patani road. The plaintiff was a pillion rider on a motor scooter No. KC 5868 whilst the 1st defendant was the driver of motor lorry No. KC 874. The 2nd defendant was the registered owner of the said lorry. The 1st defendant knocked down the motor-cyclist who was travelling on the correct side of the road.

Both the defendants admitted liability for negligence. The issue before the court was on the quantum of damages. The special damages agreed upon was $500 and the costs as agreed upon was $1,500.

Mr. Oo Gin Sun appeared for the plaintiff and Mr. Vello for the defendants. The Agreed Bundle of Documents and the Statement of Agreed Facts were put in and marked as Exhibit "A" and Exhibit "B", respectively.

The plaintiff, now 45 years old, was a padi planter owning about 10 relongs of padi land for which he pays $1,500 annual rental to the Zakat Department. On admission to the hospital after the accident, he was examined by the Medical Officer, General Hospital, Alor Star, who found the following injuries: —

1. Compound fracture of the right leg.
2. Abrasion on the face.

X-ray showed there was comminuted fracture in the mid shaft of the right tibia and fibula. His right leg was put in plaster and he was discharged (no date of discharge shown).

On April 9, 1975, he was examined by Dr. A.L.W. Bell, whose report (p.10 of Exhibit A) shows that the plaster cast from the leg has been removed, a skin grafting operation was performed for an unhealed wound in front of the right ankle and the patient thereafter was having treatment by a "bomoh". He walked with the aid of two crutches. According to Dr. Bell, the fracture of the right tibia and fibula in the lower third still remains disunited, with several degrees of angular movement of the fracture site. There appeared to be about 1/4" shortening of the leg which lies in satisfactory alignment. Movements of the right knee are normal, but of the right ankle slightly restricted, with moderate swelling of the leg and ankle. The skin grafting over the front of the ankle had soundly healed and not adherent to deeper structures. He concluded that the plaintiff was unable to put any weight on the right foot because of the non-union of the broken bones. He suggested further specialist advice should be sought with a view to possible bone grafting, on the ground that an operation, if successful, would result in a strong and stable right leg with very little permanent disability.

On July 3, 1975, the plaintiff was further seen by Dr. Lim Joo Hai, M.B.B.S. (Sydney), a general practitioner in Alor Star (PW1). While in the witness box when examining the plaintiff's right leg on request, the doctor said that the condition of the leg had become worse and angulated since he examined the plaintiff on the previous occasion. Formerly he found the alignment of his leg was straight, but now angulated posteriorly by more than 45°, and the bones are still not united. He also observed that the plaintiff's leg was shortened by 1", but admitted in cross-examination that between the time of Dr. Bell's examination and the date of his examination of the plaintiff, the leg could have further shortened from 1/4" to 1". He was also of the opinion that had the plaintiff followed Dr. Bell's advice for further surgical treatment or had undergone such treatment after his examination in July 1975, the condition of the plaintiff's right leg would have improved, and there would have been no such shortening or other defects as at present. He was further of the opinion that treatment by bone

grafting could still be done. Although Dr. Lim is not an orthopaedic surgeon, I am satisfied that his opinion, having coincided with that of Dr. Bell, should be accepted.

The plaintiff in cross-examination admitted that after his discharge he did not attend as an out-patient, but sought the treatment of a kampong bomoh, which was not successful. After that he did not go to the Hospital because he could not afford the expenses and did not wish to be admitted as that would cause inconvenience to his wife and family.

I agree, with respect, with Mr. Vello that the deterioration of his right leg, which looked quite bad, was as a result of his own act in refraining or failing from seeking further competent medical treatment. I am satisfied that he has not acted as a reasonable man should have done in the circumstances. In my view, it was the duty of the plaintiff to mitigate the damages by doing whatever is reasonable to keep down the loss as far as he could. Quoting the view of Denning L.J. (as he then was) in *Marcroft* v. *Scruttons*,[1] the matter should be viewed both objectively and subjectively. "Viewing the matter objectively, the plaintiff was quite unreasonable in refusing to follow his doctors' advice; but viewing the matter subjectively, the man's attitude was quite understandable". The subjective condition should not be accepted as great harm would be done if the plaintiff is allowed to go on receiving compensation for the rest of his life because of his refusal to accept further medical treatment. The matter, in my opinion, should therefore be viewed objectively. The test is what would a reasonable person in the plaintiff's position have done. Apart from being his duty to mitigate damages, it is also his duty to act on any medical advice he receives to the effect that the proposed treatment will give a prospect of success. If he refuses that advice, the result must be that he has acted unreasonably and that damages ought to be assessed as they would properly have been assessable if he had, in fact, undergone the operation and secured the degree of recovery to be expected from it. (*per* Jenkins L.J. in *McAuley* v. *London Transport Executive*[2]).

In the present case, therefore, I would assess the general damages not on the basis of the present disabilities, but on those that are certified by Dr. Bell on April 9, 1975, i.e. including ¼" shortening of the leg, and not on 1" shortening.

The plaintiff also suffered loss of amenities. He could not squat for a long time when doing the call of nature and had to change his position every minute or so due to numbness and pain on his right knee. He cannot walk a long distance and after walking for about 60 to 70 feet he had to stop for a while because of pain in his right leg. During the rainy season he would feel numbness and pain in the same leg, particularly during the night. He had to walk with the aid of a walking stick. He is unable to carry on cultivating padi himself as he had done before, and had to employ more labourers. He cannot sit down cross-legged and has to stretch out the right leg while having food and while having his prayers. He seldom goes out to town to buy goods for the house as he had done prior to the accident, and has to keep himself mostly in the house.

The plaintiff also claimed for loss of future earnings. Before the accident, his net income from the padi land after deducting the rental and necessary expenses for employing labour, etc. was about $6,000. During off-season he used to earn about $300 to $400 a year as a part-time house carpenter. After the accident as a result of the injuries, he had to employ more labourers on his padi land and thereby had incurred a loss of slightly over $2,000 a year. He was unable to produce any receipts or other documentary evidence to support his claim, although it is his duty to prove the damages. However, considering the fact that it is not the normal practice for padi planters and that few house carpenters issue receipts for payment, I am satisfied that the plaintiff's evidence should be accepted as an estimation. Under this head, the plaintiff's loss is not much because he was able to employ other labourers to carry on with the padi cultivation. He had not lost the padi land or any yield because of the injuries. What he had lost is slightly over $2,000 per year only. In the circumstances, I would assess a reasonable sum as damages.

Taking into consideration the above, the relevant authorities which are cited by both counsel as guidance and the drop in the purchasing power, I am of the view that a sum of $18,000 is fair and reasonable as a global sum for pain and suffering, loss of amenities and loss of future earnings. The sum is made up as follows: — (1) $10,000 for pain and suffering, including ¼" shortening of the right leg; (2) $3,000 for loss of amenities; and (3) $5,000 for loss of future earnings

As regards the question of interest, it is interesting to note that the principle laid down by Lord Denning in *Jefford & Anor.* v. *Gee*[3] has been altered as a guideline in the recent case of *Cookson* v. *Knowles*.[4] On page 823, Lord Denning said:

> "In *Jefford* v. *Gee*, in 1970, we said that, in personal injury cases, when a lump sum is awarded for pain and suffering and loss of amenities, interest should run 'from the date of service of the writ to the date of trial'. At that time inflation did not stare us in the face. We had not in mind continuing inflation and its effect on awards. It is obvious now that that guideline should be changed. The courts invariably assess the lump sum on the 'scale' for figures current at the date of the trial, which is much higher than the figure current at the date of the injury or at the date of the writ. The plaintiff thus stands to gain by the delay in bringing the case to trial. He ought not to gain still more by having interest from the date of service of the writ. We would alter the guideline, therefore, by suggesting that no interest should be awarded on the lump sum awarded at the trial for pain and suffering and loss of amenities. This is in accord with the recommendations of the Law Commission."

I am of the view that the same principle should apply to the present case, although the guideline in *Jefford* v. *Gee* has been accepted. I therefore award no interest in general damages for pain and suffering and loss of amenities. However, interest on special damages at 3% is awarded accordingly from the date of the accident until the date of trial.

Order accordingly.

Solicitors: *Oo Gin Sun, Bakar & Co.; Chang & Vello.*